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Supreme Court of the United States.

OCTOBER TERM, 1899. CASE No. 156

Filed Nov. 6, 1899.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA. IN ADMIRALTY.

In Prize.

JAMES A. FARQUHAR, OWNER AND CLAIMANT OF THE STEAMSHIP "NEWFOUNDLAND," AND DAVID ROBERTSON AND COMPANY, OWNERS OF THE CARGO OF SAID STEAMSHIP, APPELLANTS,

vs.

THE UNITED STATES, APPELLEE.

BRIEF IN REPLY FOR THE APPELLANTS.

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Counsel for Claimant.

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IN THE

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ARGUMENT IN REPLY FOR CLAIMANTS.

Since several references are made in the captors' brief to the *assumed* absence of lights on the *Newfoundland* on the evening of the capture, upon which assumption some points of the captors' argument are based, it may be expedient to quote more fully the evidence showing that the *Newfoundland's* regulation lights were burning from sunset to the time of capture.

Captain Malcolm, of *Newfoundland* (fol. 174):

Q. Were your lamps lit that night?
A. They were.
Q. And the night before?
A. They were.
Q. You will swear to that positively?
A. I will.
Q. The lights required by the Government regulations—that is, a light forward on the mast?
A. Masthead light and the two side lights.

First Mate Salkus (fol. 204):

Q. Were the regulation lights on the ship burning at that time (at time of capture)?
A. Yes; they were put out at sunset (meaning, put in place).

Second Mate Bursey (fol. 215):

Q. Whom did you relieve when you went on deck at 8 o'clock?
A. I relieved the mate.
Q. At that time were the lights lit on the vessel?
A. Yes, and burning bright.
Q. The masthead?
A. Yes.
Q. And the side light?
A. Yes.
Q. And what other lights are on the ship?
A. The binnacle lights. That is all I know about.
Q. Those lights you mentioned were lit and burning brightly?
A. Yes.
Q. Were they put out between 8, when you came on deck at any time, and 10, when the *Mayflower* captured you?
A. No; they were not put out.
Q. You are perfectly sure of that?
A. Yes; I am perfectly sure of that.

William Cody (fol. 216):

Q. What is your position and duty on the *Newfoundland?*
A. Seaman and lamp-trimmer.

Q. Have you charge of the lamps?
A. Yes.
Q. On the night of 19 July, the night you were captured, did you light the lamps?
A. Yes; and put them out.
Q. When did you light them?
A. Sunset.
Q. When did you put them out?
A. I put them out as the sun was going down. I had them lit, and was putting them out as the sun was going down.
Q. Did you put them where they belonged?
A. Yes; the masthead, and then the port light, and then the starboard light.
Q. You did that at sundown?
A. Yes.
Q. Did those lights remain burning in that position you put them in?
A. Yes; those were there burning when I came on at 12 o'clock, in the same position.
Q. When did you leave the deck after lighting the lamps?
A. After 8 o'clock.
Q. Were they burning then?
A. Yes.

Blackmore, the wheelman from 6 to 8 p. m., says (fol. 219) the ship's lamps were burning at 8, when he left the wheel.

There is *no* evidence that the lights of the *Newfoundland* were not burning. Captain Mackenzie thought they might not have been, but he admits, at folio 117, that they might have been burning and not been seen from the *Mayflower*, because the lights are only visible two points abaft the beam.

The evidence of the continuous westerly course of the *Newfoundland* along the Cuban coast, without deviation or loitering or attempting to enter any port, and of the contem-

poraneous record of the same on her chart, is also as clear and positive as that regarding the lights.

Captain Malcolm (fols. *160*, 162, 163, 166, 168, 170, 178, 189).
Mate Salkus (fols. 203, 205).
Mate Bursey (fol. 215).
Helmsman Blackmore (fol. 218).

This evidence is corroborated by—
Captain Mackenzie (fol. 110).
Lieutenant Evans (fol. 143).
Lieutenant Nickerson (fols. 147, 148).

A considerable portion of the captors' argument (*e. g.*, pp. 10 and 29 of Captors' Brief) and also of the decision below is based upon the *assumption* that the light seen by the *Mayflower* off shore at 8.20 p. m. on the evening of the capture was that of the *Newfoundland*. We reiterate that not only was it impossible for the *Mayflower* to see the lights of the *Newfoundland* at that time because she (the *Newfoundland*) was too far away—a distance of 17½ miles off shore (fol. 164), shown by the position contemporaneously marked on the *Newfoundland's* chart (fols. 160, 170) by the captain, and according to the positive evidence of the officers and crew of the *Newfoundland*—but such an *assumption* is decidedly uncertain and therefore unwarranted because of the fact that lights were often seen by the blockading squadron at night off Havana. Captain Mackenzie himself says (fols. 115, 116): "I think that night we chased something else. * * * As to chasing, we chase all the time, two or three newspaper tugs at night; spent over half a ton of coal chasing newspaper tugs and we don't get anything" (also fol. 117).

It is tolerably certain that the *Mayflower* did not then and never since has known her true position at 8.20 or 8.30 that night, for Captain Mackenzie says they were covering about five points of the compass, backwards and forwards—that is

to say, on the arc of a circle of seven miles' radius from Morro, or an arc, in this case, of about eight miles in extent, and Lieutenant Nickerson says a "big heavy set of current" running alongshore (fol. 148); and, notwithstanding the statement in the captors' brief (p. 10) that "Ensign Pratt had fixed the position of the *Mayflower* at 8.30 p. m. by taking bow and beam bearings on the Morro, which were true within a quarter to half a mile," we find that Ensign Pratt himself says (fol. 134): "A good allowance is half an hour; but I was going on to say further—I hadn't completed my answer—that I hadn't completed my bow and beam bearing. We had started to take it when I sighted this light." The true position, therefore, was never ascertained; consequently the distance of the *Newfoundland* off shore as deduced from the *Mayflower's* log and run is unreliable.

The diagrams (and the distances and courses marked thereon) used by the captors are equally uncertain, owing to the fact that they were made the day following the capture, and were not contemporaneous records, but rather the result of estimations or guesses and theory (Captain Mackenzie, fol. 93; Lieutenant Culver, fol. 125; Ensign Pratt, fol. 134; Lieutenant Evans, fol. 143, and Mate Nickerson, fol. 148).

The principal contention of the captors is that the *Newfoundland* "loitered" (Captors' Brief, p. 30) after 5.35 p. m. on July 19.

Now, it has been conclusively demonstrated, we submit, in the claimants' brief, that the time of departure of the *Newfoundland* from the *Tecumseh* was 6.30 p. m. or even later, because, aside from the fact that the officers of the *Newfoundland* carefully noted the time at which the *Tecumseh* left them, it seems settled beyond question, from the evidence of Mate Nickerson, of the *Tecumseh*, alone, when he says he could only see the *Newfoundland* for ten minutes after she left the *Tecumseh*, because "dusk settled down then"

(fol. 148), that the departure must have been after sunset—6.37 p. m. (fols. 204, 127)—and probably nearly 7 o'clock. Allowing the *Newfoundland* 10 or 15 minutes to get up speed again, she thus, in this evidence alone, to say nothing of the positive testimony of her officers that there was no loitering (fols. 222, 228), borne out by the fact that her run from her noon position, which is not attempted to be disputed, to her point of capture at her full known speed, must necessarily have been made without any more delay than was caused by the *Tecumseh*, and in a straight line, fully accounts for the ten-mile run, or the time equivalent for the *Newfoundland* of something over one and a quarter hours at a speed of 7⅓ miles per hour, for which Captain Mackenzie, at folio 114, says he considers she must account. Again, on reference to the chart it is seen that at the *proved* rate of speed of the *Newfoundland* (7⅓ miles per hour) she had all she could do to get from the point where the *Tecumseh* met her to the point of capture in a straight line (a distance of 27 miles) in the three and one-half hours between 6.30 and 10 p. m. without any delay by loitering. If she zigzagged (as is also contended), still less is it possible that she loitered. If she loitered, she had no time to zigzag. The captors cannot blow both hot and cold, but they attempt to do so in order to sustain their surmises and theory as to courses and distances.

Neither can the captors claim that their "estimate" of the *place* of boarding by the *Tecumseh* (made on the following day on an open sea without a contemporaneously recorded observation, folios 143, 148) can be depended upon, when the log of the *Tecumseh* as to the *time* of boarding, made at the time, is manifestly incorrect. Captain Malcolm, on the other hand, put down his positions on the chart contemporaneously (fols. 152, 160, 170), showing the place of boarding by the *Tecumseh* about 14 miles off shore.

At page 29 of captors' brief we find it stated that "it is just possible, as stated by Captain Mackenzie, that the *Mayflower*

alone, and not the *Newfoundland*, was repeatedly changing her course; but this does not appear very likely from the *Mayflower's* log." A perusal of that log (fol. 235), however, shows at once that the *Mayflower* did zigzag from a northwest course to a southwest course and *vice versa* more than once. (See Lieutenant Pratt's testimony, pp. 76, 77 of transcript.) The *Newfoundland*, on the other hand, we submit, is shown by the evidence to have been pursuing a due west course at the rate of 7⅓ miles per hour, across the wake of which course the *Mayflower* evidently was seesawing at the high rate of speed of 16 knots. This is the reason why it took the *Mayflower* a considerable time to come up to the *Newfoundland* and why Captain Mackenzie was surprised when Captain Malcolm told him that the *Newfoundland* had been traveling only at about 8 knots per hour (fol. 176).

The "*theory*" of Commander Mackenzie (fol. 90, p. 50), of Lieutenant Culver (fol. 120, p. 67, and fol. 123, p. 69), and of the circuit judge's decree (fol. 244, p. 138) rests upon the assumption that the "faint light" seen at 8.20 p. m. from the *Mayflower* was the light of "a plain lantern" hanging in the companionway of the *Newfoundland*, "reported *N.* by *W.* from 2 to 3 miles away."

Lieutenant Pratt thought that such a lantern hung in the companionway or "after deck-house" of the *Newfoundland* could be seen from a point "abeam on east side" or "pretty nearly abeam" (p. 74, fol. 132); but against this we have the positive and precise testimony of Captain Malcolm, master, and of Salkus, mate, of the *Newfoundland*, showing that a lantern hanging as the lantern in the companionway of the *Newfoundland* hung would not be visible from a point "abeam," but would only be visible between the bearings, 4¼ points and 5 points *abaft the* beam (*Malcolm's testimony*, p. 99, fol. 176, and *Salkus*, p. 116, fol. 204, 205).

The measurements of the after deck-house and bearings of the light through the doors in the after house or companionway were taken by the mate *Salkus* while the *New-*

foundland was in the port of Charleston in the custody of the United States marshal and while the testimony in the case was being taken, and these measurements and bearings were so taken to enable him to say at what points of the compass that light would be visible through those doors.

It was in the power of the captors to have refuted this testimony by an examination of the after house or companionway and by testimony to contradict it if it had been incorrect. No such attempt was made. It must therefore be held to have been proved, as stated by the master and mate.

If, then, such a lantern so hung in the companionway of the *Newfoundland* could *only* be visible to an outsider from a point 4¼ or from a point 5 points abaft the beam and the intermediate points between those bearings, it follows, mathematically, that it could not have been seen on the *Newfoundland* when she was west by north—that is to say, *one* point west of north from the *Mayflower*. It could only have been seen when she was 4¼ to 5 points west of north from the observer. It follows, therefore, indisputably, that the "faint light" seen at 8.20 by Lieutenant Pratt from the *Mayflower* 2 or 3 miles off north by west could not have been the lantern of the *Newfoundland*, and that the circuit judge was clearly in error in saying (p. 138, fol. 244): "It is clear that the light thus described was that of a lantern hanging on the wall of the companionway in the after deck-house of the *Newfoundland*."

This, again, goes to corroborate the proof from the officers of the *Newfoundland* that she was 17½ miles away and out of sight from the *Mayflower* at 8.20 or 8.30 p. m.

In the log of the *Mayflower* it is stated that the light seen by her during her run was seen first on one beam and then on the other, as if extinguished at intervals; but, as a matter of fact, it was shown on the hearing that the deck-house of the *Newfoundland* had a narrow doorway on each side, and suspended to the roof of this house a lantern was hanging

during the evening. The *Mayflower*, drawn from the squadron by some stray light, "opened" this light, if the *Newfoundland's*, first through the port doorway of the *Newfoundland* and headed for it on a northwest course—that is, in a direction diagonally across the wake of the *Newfoundland*. The light, of course, was lost to view as soon as the *Newfoundland* had drawn sufficiently far away in her westward straight course so as to close to the view of the *Mayflower* the doorway through which the lantern shone. The light would not be disclosed again on account of there not being any opening in rear end of deck-house until the *Mayflower* had overrun the wake of the *Newfoundland* sufficiently far to open the light through the starboard doorway of the *Newfoundland's* deck-house. The *Mayflower* then headed for it again on a southwest course. It was shortly lost again to her view until she again opened it through the port doorway of the *Newfoundland's* house. (See decision below, fol. 244.)

The captors are therefore wrong in saying it is not likely that the *Mayflower* repeatedly changed her course.

The captors say (at p. 23 of their brief) that "the master (of the *Newfoundland*), at all events, thought, as the officers of the *Badger* thought, that there was a blockade at Sagua and Caibarien, and therefore it is not quite true that the master might well have gone to either of these ports for the purpose of testing the validity of the supposed blockade, which the court below appears to think." In this statement the captors agree with the claimants as to the cause of Captain Malcolm's perplexity at this point. The captain before leaving Halifax had been told by the owners that the ports of Sagua and Caibarien were open ports, and had been furnished with a map (in evidence) showing these ports as open ports. He was confronted with a sudden and direct contradiction, and naturally felt that these American officers, who were on the spot, must certainly be right as to the blockade, and if he disclosed to them that he had sailed for ports that were actually blockaded and asked that he might

be permitted to turn back from his westward course he would quite probably subject himself to suspicion grave enough to be instantly seized and sent into port for adjudication. At the least, he had no assurance that such would not be the case, so he kept right on, on his westward course with the idea that that was his only safe course. The district court thought the captain might have safely gone into these ports. Captain Malcolm did not think so, and at folio 229 incidentally explains why not. He says: "The boarding officer of the *Badger*, Lieutenant Titus, told me the only light I would see lit on the Cuban coast from that point until I got to Havana would be Key Francis, which he said had been taken by the Americans, and the light Key Francis is at the entrance of Caibarien. I saw I was going to pass that light before dark, and I felt if I could have seen that light lit it would have eased me in the position I was in, and I slowed the ship and went aloft, and I saw the light of Key Francis. After I saw it I proceeded again. That is the reason I slowed the ship down that particular time." If, therefore, he had any remote intention of trying to enter these ports after leaving the *Badger* he was convinced by seeing the light at Key Francis that in doing so he would thereby run into the hands of the American authorities, who had possession of these ports, as he was led to believe through the erroneous information he had received, and the cargo, entrusted to his care, would fall into other hands than those of the consignees. Having come to this point of the coast, he could not go back over his course now and meet the officers of the *Badger*, who, he then felt sure, had correctly informed him as to the blockade, but made up his mind to get to Kingston "and telegraph for orders." He could also satisfy his owners that he had passed these ports. In this connection it might also be observed that in his examination at Charleston, although he had been found on a westward course along the coast of Cuba, Captain Malcolm stated that he was going to Kings-

ton instead of the port of Vera Cruz, directly ahead of him, which, in the case of a dishonest man bent on giving the most plausible explanation, would have been the probable story, and would have got rid of any difficulty about a circuitous route to Kingston. Such testimony, we submit, points unerringly to the truthfulness and reliability of Captain Malcolm's whole evidence. It is noticeable also that Captain Malcolm did not slacken speed on his voyage after leaving Sagua in order to reach the vicinity of Havana in the dead of night, but was in sight of squadron before sunset and well past Havana at 10 o'clock that evening, when he was seized.

At page 21 of the captors' brief it is said: "The vessel proceeds from Halifax cleared for an alternative destination, an unusual clearance, which seems to be customarily allowed under Canadian regulations when a vessel clears domestic as a subsidized mail boat, proceeding to other domestic ports; but this was a foreign clearance."

We submit that the evidence does not show that this practice is confined to mail boats or domestic ports (fol. 164); neither is the practice unusual or confined to Canadian custom-houses. The court below says: "Commander Mackenzie testifies that it is not the practice of any American custom-house to give two clearances. Captain Malcolm says that this is not unusual in Halifax, and that he has generally had separate clearances for separate ports, sometimes five or six, whenever he had *cargo* for each. We have no statute prescribing any regulations on this subject, and whenever a ship has separate cargo for separate ports I can see no reason why she should not have a clearance for each, and I am informed that it is the custom at this port (Charleston) to give such separate clearances. * * * For reasons into which it is not the province of this court to inquire, neither Sagua nor Caibarien were included among the ports blockaded under the proclamation of the President and he had the right to go to either. Whether

in so doing without proper clearances he would have incurred penalties under the municipal regulations of Great Britain or of Spain is not within the scope of this inquiry; certain it is that he would have committed no offense cognizable here."

In the case of *The Rising Sun* (2 C. Rob., 105) Sir William Scott says:

"The destination is very inaccurately expressed; some of the papers describing it to have been Charleston, others to Altaia, whereas the true destination was to Guernsey, but as they are both neutral ports, I do not think there is much in that, more especially as it is the general practice not to allow a vessel to clear out for an enemy's port."

From *The Watchful* (6 Wall., 93) we quote:

"The record as it stands shews that the vessel cleared for Hamburg, when her destination was certainly Matamoras, Mexico; that her clearance was probably altered after she was at sea by writing over the word Hamburg the word Matamoras; that a false manifest was used, and the fact of the main cargo of 252 cases of arms being on board was carefully concealed from the officers of the customs at New York, from which port she sailed. * * *

"It is very clear that there is no case of prize made out by the evidence. The property, which was undoubtedly Wallis's, was therefore not enemy's property, nor is there any evidence of intention to break the blockade or to trade with the enemy. The case is so destitute of all elements of prize that the present libel was properly dismissed."

Similarly, no importance can be attached to the manner of the *Newfoundland's* clearance. It must be evident that the owners, being business men, thought that if she publicly cleared for Sagua or Caibarien, it would become immediately known to the American consul at Halifax, whose duty it probably was to report vessels bound to Cuba, and it would not be long before the fact would be communicated by telegraph to the American Government, and

on the arrival of the *Newfoundland* at Sagua she might have found a ship of war with authority to state to her that the port was under blockade, and thus not only this, but future voyages to Sagua would be interrupted.

In the instructions to blockading vessels drawn up for the war with Spain the following paragraph countenances alternative destinations:

6. A neutral vessel may sail in good faith for a blockaded port, with an alternative destination to be decided upon by information as to the continuance of the blockade obtained at an international port . . . (Snow Int. Law, 153).

The captors' contention (p. 21 of their brief), that there was a blockade *de facto* along the whole coast of Cuba, is both new and unsustainable. It is not shown that the *Badger* had the slightest authority to declare a blockade, or that such a blockade did in fact exist, and the burden of proof of the existence of a blockade *de facto* is on the captors (Wharton's International Law, vol. III, p. 362). Moreover, there was no violation of any such blockade by the *Newfoundland*, if it ever did exist. Again, it cannot be said that two small tugs, the *Badger* and *Hudson*, on the long coast line of Cuba between Cape Maisi and Havana can constitute an effective blockade according to American or English ideas of blockade, either *de jure* or *de facto*.

"Although the commerce of the United States has been to a greater extent than any other a victim of those gigantic abuses of power it has never suffered without just complaints in individual cases and constant and strong remonstrance on the part of the government of the said States against the principle and practice of everything like an imaginary blockade, the hydra of lawless oppression.

"Thus it has ever been maintained by the United States that a proclamation or ideal blockade of an extensive coast not supported by the actual presence of a naval power competent to enforce its simultaneous, constant and effective operation on every point of such coast is illegal *throughout*

its whole extent, even for the ports which may be in actual blockade. This is in general terms one of the fundamental rules of the law of blockade as professed and practiced by the Government of the United States" (*Mr. Marshall, Sec. of State, to Mr. King, 20th Sept., 1800; 2 Am. State Papers, 488.* See also *Roberts on Admiralty and Prize, 492*).

The Guantanamo incident mentioned in captors' brief is fully explained, at folio 67, by an eye-witness, Mate Salkus, as follows:

"On the last voyage we sailed in Guantanamo, but we were told the place was blockaded, and we left. It was taken the morning before by the United States, we were told by the visiting officers of the U. S. men-of-war; that was last month, in June, on the previous voyage. We heard of the Guantanamo blockade the day we arrived, but we were not warned, and had seen nobody before such time to tell us not to enter such port. I could not say about the conversation; the officer only told us the place was taken the morning before and we could not proceed up the bay. Captain Farquhar, then master of the ship, then said he had a cargo of sugar, and they said he could not get it out under the Spanish flag, but we might get it out under the American; that was at Guantanamo. We went out then and proceeded to Porto Rico."

WANT OF PROBABLE CAUSE.

The doctrine of probable cause is comprehensively dealt with in the case of *Schacht vs. Otter* (10 M. P. C. C., 163):

"Neither in the texts, nor in the decided cases to which we have thus referred, do we find it stated that in order to subject captors to condemnation in costs and damages, vexatious conduct on their part must be proved (except as some degree of vexation is necessarily implied in the detention of a vessel without reasonable cause, after she has been searched) or that honest mistake, tho' occasioned by the act of the government of which they are subjects, can relieve them from their liability to make good to a foreigner and neutral (and with this case alone we are dealing) the damage which, by their conduct, he has sustained.

"Nor is it easy to perceive upon what grounds of reason or justice such excuses could rest.

"If costs and damages were inflicted as a punishment on captors, honest intention would be a consideration of the greatest weight, but the principle on which they are awarded is that of affording compensation to a party who has been injured.

"So as to error occasioned by the proceedings of their own government.

"The captors act as the agents of the State of which they are citizens, and which must ultimately be responsible for their acts. Prize courts afford the remedy as between the individuals, which otherwise must be sought by the government of the claimants against the government of the captors; but the mode of proceeding cannot affect the right to redress, and if the State could not urge its own mistakes as a justification of its own wrong, neither, it should seem, should individual citizens be permitted to do so.

"The law of nations upon these points appears to us to be settled by decisions both in the American and European courts. * * * The natural rule is, that if a party be unjustly deprived of his property, he ought to be put as nearly as possible in the same state as he was before the deprivation took place; technically speaking, he is entitled to restitution with costs and damages.

"* * * Neither does it make any difference whether the party inflicting the injury has acted from improper motives or otherwise. If the captor has been guilty of no wilful misconduct, but has acted from error and mistake only, the suffering party is still entitled to full compensation, provided, he has not, by any conduct, contributed to the loss."

(In this case no sea letter describing and identifying the ship was amongst the documents produced.)

"By the usage of all countries, captors have a great interest in increasing the number of prizes. The temptation to send in ships for adjudication is sufficiently strong, &c.

"* * * We have been guided to the conclusion at which we have arrived by what we consider to be established principles. They appear to us to be founded both in justice and convenience, reconciling, as far as possible (what it is very difficult to reconcile) the conflicting rights of belligerents

and neutrals. We have adopted them, however, not upon any views of our own, but because we consider them to have been recognized and acted upon by the general consent of nations."

We further submit the fact, in the consideration of this subject and of damages, that had it not been for the erroneous information got from the *Badger* the *Newfoundland* would never have been in the vicinity of Havana or have come in contact with the *Mayflower* at all.

As to measure of damages, see Phillimore's Int. Law, vol. III, p. 698.

THE AUTHORITIES.

According to the authorities the ship and cargo should be restored with damages and costs. In summing up the evidence the judge below (fol. 246) says:

"There is marked discrepancy, and the first point to be decided is which is correct. Applying the usual tests by which testimony is weighed, the intelligence of the witnesses, their opportunities for knowing the truth, the likelihood of error arising from considerations of interest, and other influences which commonly sway men's minds there can be no doubt that there is a preponderance of probability in favor of that side which having no interest in the controversy has the greater opportunity of knowledge."

Sir William Scott, in dealing with the same difficulty in "*The Haabet*" (6 C. Rob., 58), observes:

"Which should the court believe? Can it be maintained that the preference should be given to the captors, and that in opposition to the general rule, which has given the preference the other way, and which directs that the property of the neutral claimant shall not be condemned except on evidence coming out of his own mouth or arising out of the circumstances of the transaction. If the rule is unsatisfactory to captors it is nevertheless the rule which the law prescribes. It is my duty to take care that the rules of law

are observed and that the rights of war are not exceeded, and certainly in no cases more than in this particular branch of nations which must in its nature operate with severe restraint upon neutral commerce."

Roberts on Admiralty and Prize:

"Three things favor the restitution of captured property claimed by neutrals.

(1.) A *presumption* of innocent neutral intentions as to the blockade.

(2.) Proof of fair and not fraudulent conduct on the part of a neutral claimant.

"In the case of '*The Lively*' (1 Gall., 317) the reasons assigned by the captors for the capture were that the schooner was not truly described in her enrollment and license, and from some other appearances on the face of the papers he suspected them to be forged. Another reason assigned was that when hailed the master answered that he was bound to Machias and afterwards said he was bound to Eastport. Another reason was the conduct of the schooner which Captain Downey (the captor) thought indicated a design to trade with the enemy."

STORY, *J.*:

"It has been contended upon the facts in this case that there was probable cause for capture, but I am perfectly satisfied that there was no such cause."

The Wren (6 Wallace, 582): "In this case the vessel had previously run the blockade at Galveston. One of the crew had heard from a former captain of the ship that she belonged to the Confederacy. A Confederate agent at Havana had appointed a master to take charge of the vessel. The purser heard the ship's agent say that she was owned by a firm one of whose members was a citizen of the Confederacy."

NELSON, *J.*:

"Now most of the proofs relied on * * * are incompetent as testimony in a court of justice; we cannot think that it needs any argument to show that they do not rise to

the character or dignity of testimony in any court that respects the law of evidence.

"We agree that in the facts and circumstances surrounding and attending the history and operations of this vessel and of the individuals connected with her, there are matters for well-grounded suspicion and conjecture as it respects the purpose and intent with which the vessel was originally built and sent to Havana, and as she entered immediately in furnishing supplies to the enemy and receiving cargoes of cotton in return, it is not unnatural or unreasonable to suspect that the so-called Confederate States or their agents had some connection, if not some interest, in her. But this alone is not evidence upon which to found a judgment in the administration of justice. The fact the master, Stiles, who was put in command of her for the voyage home from Havana to Liverpool was an officer of the enemy's naval service, and had belonged to the U. S. Navy, and Helms, who was in some way not explained connected with her voyages in running the blockade and who was the agent of the enemy at Havana might well be entitled to consideration and weight on the question if there had been any legal proof in the case laying a foundation for such a conclusion; so also would the evidence that Stiles destroyed at the time of capture, a letter from Helms, agent of the ship as he calls him, to himself. * * * But in the view we have taken of the case there is no foundation of legal proof of the ownership of the vessel in the Confederate States, on which these circumstances can rest or be attached as auxiliary considerations to influence the judgment of a court."

Decree of district court reversed and vessel restored.

"*The Flying Scud*" (6 Wallace, 263):

"A British ship left Nassau in January, 1863, laden with a cargo of timber, tin, iron, powder, and horseshoes and was destined ostensibly for Matamoras, Mexico (a place separated from Texas and the commercial town of Brownsville in it only by the dividing river, the Rio Grande). She arrived at Matamoras at the mouth of the Rio Grande (where on account of a bar vessels of any size are obliged to anchor), on the 1st of March. After remaining there for a week or ten days she sailed for Brazos, Santiago, a port in Texas about

nine miles from the mouth of the Rio Grande, where her cargo was discharged and carried to Point Isabelle, also in Texas. The vessel remained at Santiago till some time in May, when she returned to the mouth of the Rio Grande. While here in July she was chartered by a Spanish subject, a merchant in Matamoras, to carry a cargo of cotton from Matamoras to Havana. *Claimed for cargo.*

"It was contended that a person carrying on trade in time of war in a region so exceedingly suspicious as from its geographical character was the Rio Grande must show a case above all suspicion, and the outward voyage which undoubtedly was meant for Texas and was criminal involves the present one in grave suspicion."

NELSON, *J.*, held:

"The transaction (*re* cotton cargo) appears free from all doubt or obscurity. * * * The argument therefore founded on the suspicion that the claimants were connected with the breach at Brazos is without any foundation."

"*The Sea Witch*" (6 Wallace, 242), a neutral vessel with a neutral cargo, cleared from Vera Cruz for New Orleans (then open to trade), but at the time of capture she was out of the ordinary and most direct line of a voyage from Vera Cruz to New Orleans and somewhat along the coast and in a position to go to Galveston, Texas, then blockaded.

CHASE, *C. J.*:

"The only ground of suspicion, that a violation of the blockade was intended was the fact that the vessel when captured was out of the most direct regular course to New Orleans, and in a part of the Gulf where she would very probably have been had her real destination been Galveston. But we think this is sufficiently accounted for by the weather and by the probability that such a vessel really bound for New Orleans would prefer to keep at no greater distance from the shore than the blockade would require rather than take the more direct course across the Gulf."

"*The Pizarro*" (2 Wheaton 91), Story, *J.*:

"In this case there has been a gross prevarication and suppression of testimony by master and supercargo. Nothing can be more loose and unsatisfactory than their first examination, and the new and circumstantial details given upon their second examination are inconsistent with the notion of perfect good faith in the first instance. The excuse, too, for throwing a packet of papers overboard is certainly not easily to be credited. * * * If indeed upon the original evidence the cause should appear extremely doubtful or suspicious and further proof should be necessary, the grant or denial of it would rest upon the same general principles which govern the discretion of prize courts in other cases; but in the present case there is no necessity for such further proof, since the documents and testimony now before us are in our opinion as to the proprietary interest in the ship entirely equivalent to the passport and seal letter required by the treaty."

Ship and cargo restored.

"The *Sir William Peel* (5 Wallace, 517 536). The cargo consisted in part of powder, cartridges, pistols, cutlasses, etc., and it was testified that the consignees, Milmo & Co., Matamoras, had the general reputation of being the agents of the confederacy; that they had a branch-house in Brownsville, nearly opposite, in Texas, and were engaged in receiving cargo from Europe, which they disposed of to the military authorities of the confederacy, receiving and lading, in return, cotton, which the confederacy had seized and over which it exercised the right of property. Moreover, no papers were found on board."

CHASE, *C. J.*:

"There is some evidence which justifies suspicion. Several witnesses state facts which tend to prove that the *Peel* was in the employment of the rebel government, and that part of the cotton laden upon her as return cargo was in fact rebel property.

"There are statements, on the other hand, which make it probable that the *Peel* was in truth, what she professed to be, a merchant steamer belonging to neutral merchants and

nothing more; that her cargo was consigned in good faith by neutral owners for sale at Matamoras, or to be conveyed across the river and sold in Texas, as it might lawfully be, not being contraband; that the cotton was purchased by neutrals and on neutral account with the proceeds of the cargo or other money. In this conflict of evidence we do not think ourselves warranted in condemning." * * *

Fitzsimmons vs. Newport Ins. Co. (4 Cranch, 67), Marshall, C. J.:

"This treaty (between U. S. and G. B.) is conceived to be a correct exposition of the law of nations. * * * It is impossible to read that instrument without perceiving a clear intention in the parties to it that after notice of the blockade an attempt to enter the port must be made in order to subject the vessel to confiscation. * * * These words strongly import a stipulation that there shall be a free agency on the part of the commander of a vessel after receiving notice of a blockade, and that there shall be no detention nor condemnation unless in the exercise of that free agency a second attempt to enter the invested place shall be made. * * * The commander of the blockading squadron, * * * availing himself of some equivocal, unguarded, and perhaps indiscreet answer on the part of the captain, the vessel was sent in for adjudication, and on these expressions was condemned.

Judgment of circuit court reversed with costs.

NOTE.—1st. The words are not that in the exercise of that free agency he "must not subject himself to suspicion," as claimed by the judge below.

2d. Far from any attempt on the part of the *Newfoundland* to enter a blockaded port, it is merely suggested in a very indefinite manner that she loitered; and, moreover, Commander Mackenzie did not dream of the loitering theory until after the capture. At the time of the capture Captain Mackenzie not only did not know of any attempt to enter

and did not know of any loitering, but found the vessel on her westward course.

In the case of *The Madonna* (4 C. Rob., 169) there was "vehement suspicion" as to the cargo being enemy's property, and also on account of the spoliation of some papers. It is only fair to say that in this case the captors were greatly blamed for delaying to bring the matter promptly into the prize court, three or four months being made in doing so. The property, notwithstanding "vehement suspicion" and spoliation of papers, was restored, with demurrage and compensation.

"*The Science*" (6 Wall., 178), Chase, C. J.:

"Some of the proof tended to show that a portion of the cargo consisted of Confederate uniform cloth, but there was none showing destination to enemy's territory or immediate enemy use. There was therefore nothing in the character of the vessel or of the outward cargo which warranted condemnation."

"*The Volant*" (6 Wall., 179), Chase, C. J.:

"The cargo was shipped by the charterers of the vessel for neutral owners, and consigned to neutrals at Matamoras, but had not been discharged at time of capture.

"It consisted in part of bales of Confederate uniform cloth, of the same mark and corresponding numbers with like goods found on the *Science*, but there is no proof of unlawful destination. The brig, however, anchored in Texan waters near the coast, and remained there until captured.

"This circumstance alone did not warrant condemnation."

From the above we submit that there was no probable cause for seizure, because:

1. Hearsay reports are not to be taken as a cause for seizure.

2. The matter of clearances is at most only a breach of municipal law.

3. The reasons given by Captain Mackenzie were not known to him at the time of capture, and did not, in any event, warrant a seizure.

The *Newfoundland* had all her "ship's papers" on board at time of capture.

According to law of *United States* these are:

Certificate of registry.
Sea letter or certificate of ownership.
Ship's log book.
National flag.
Charter-party (if vessel is chartered).
Manifest of cargo.
Custom-house clearance.
Bills of lading.
Shipping articles.
Muster-roll.
Bill of health.

(See Lushington's Naval Prize Law, 33.)

According to law of Great Britain the list is practically the same.

(See Lushington's Naval Prize Law, 30.)

We respectfully submit the question to the court and ask for a reversal of the decree below, with costs, and damages as for seizure of a neutral merchant ship without probable cause.

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